

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposal to extend plan
for recording of certain
expenses for years 1998 and 1999
for Florida Power & Light
Company.

DOCKET NO. 970410-EI
ORDER NO. PSC-97-1070-PCO-EI
ISSUED: September 10, 1997

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING MOTION TO DENY AND DISMISS PROTEST

BY THE COMMISSION:

In Docket No. 950359-EI, we approved a proposal by Florida Power & Light Company (FPL) that resolved all of the identified issues regarding FPL's petition to establish a nuclear amortization schedule. By Order No. PSC-96-0461-FOF-EI, issued April 2, 1996, FPL was required (1) to book additional 1995 depreciation expense to the reserve deficiency in nuclear production; (2) to record, commencing in 1996, an annual \$30 million in nuclear amortization, subject to final determination by the Commission as to the accounts to which it is to be booked; and (3) to record an additional expense in 1996 and 1997 based on differences between actual and forecasted revenues, to be applied to specific items in a specific order.

This docket was opened to consider an extension of and modification to the plan to allow the recording of additional expenses in 1998 and 1999.

By Proposed Agency Action Order No. PSC-97-0499-FOF-EI, issued April 29, 1997, in this docket, we approved an extension of and modification to the plan. On May 20, 1997, AmeriSteel Corporation (hereinafter "AmeriSteel") timely filed a protest of the Proposed Agency Action. AmeriSteel has also petitioned to intervene in the docket. After reviewing the pleadings, the Prehearing Officer

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directed staff to file a recommendation on two pending motions for consideration by the full Commission.

Staff filed a recommendation for the July 15, 1997, Agenda Conference, addressing the two pending motions, AmeriSteel's Petition to Intervene and FPL's Motion to Deny and Dismiss the Protest of AmeriSteel. Staff also addressed FPL's request for Oral Argument on its Motion.

At the July 15, 1997, Agenda Conference, we granted FPL and AmeriSteel oral argument. After oral argument from the parties and questions from the Commissioners, the Commission decided to defer consideration of the recommendation. Staff was directed to supplement its recommendation to address the issues of burden of proof, standing, and the scope of the proceeding. Having considered the supplemental recommendation and the further arguments of the parties, we now render our decision.

AmeriSteel's Motion to For Leave to File an Amended and Supplemental Petition and Protest to Proposed Agency Action, AmeriSteel's Request for Oral Argument, and AmeriSteel's Request for Continuance

On August 6, 1997, AmeriSteel filed a Motion to For Leave to File an Amended and Supplemental Petition and Protest to Proposed Agency Action, AmeriSteel's Request for Oral Argument, and AmeriSteel's Request for Continuance. FPL's response to these motions was not due until after the agenda conference.

We believe we have sufficient information, and the parties have been given a reasonable opportunity to provide input, to resolve FPL's Motion to Deny and Dismiss AmeriSteel's Protest and AmeriSteel's Petition to Intervene. The resolution of these two pending motions may render these recent pleadings and response moot. We believe it is appropriate to resolve the two motions which have now been pending for more than two months. Therefore, we find that AmeriSteel's Motion to For Leave to File an Amended and Supplemental Petition and Protest to Proposed Agency Action, AmeriSteel's Request for Oral Argument, and AmeriSteel's Request for Continuance shall not be addressed at this time.

Florida Power & Light Company's Motion to Deny and Dismiss the Petition and Protest of AmeriSteel Corporation

On May 20, 1997, AmeriSteel timely filed its Petition and Protest of AmeriSteel Corporation to Proposed Agency Action. AmeriSteel alleges that it has a substantial interest that is

affected by the Commission's proposed action. In the first paragraph of its pleading, AmeriSteel:

protests the entry of the PAA and requests that hearings be held before the Commission to consider whether to finally approve an extension, with modifications, of the program authorizing Florida Power and Light Company to record additional expenses for the years 1998 and 1999 ("Accelerated Depreciation Plan" or "Plan"). (Protest p. 1)

AmeriSteel's Substantial Interest

On April 11, 1997, AmeriSteel filed a petition for leave to intervene in this proceeding. AmeriSteel alleges that it has a substantial interest that will be directly affected by the outcome of the Commission's determination in this proceeding. These same allegations were also raised in AmeriSteel's protest. AmeriSteel operates a steel recycling and manufacturing facility located within FPL's retail service territory. In essence, AmeriSteel alleges that but for the extension of the plan, FPL would earn in excess of its authorized return on equity in 1998 and 1999. AmeriSteel alleges that but for the additional expenses authorized by an extension of the plan, "...customers, including AmeriSteel should expect refunds as FPL exceeds the profit sharing threshold."

On April 25, 1997, FPL filed its response to AmeriSteel's petition to intervene. FPL asserts that the substantial interest alleged by AmeriSteel satisfies neither of the requirements of the two pronged test set forth in Agrico Chemical Company v. The Department of Environmental Regulation, 406 So. 2d 478,482 (Fla. 2d DCA 1981):

...before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial interest is of a type or nature which the proceeding is designed to protect.

Although not contemplated by Commission rules, AmeriSteel followed FPL's response with a request for Judicial Notice of Order No. PSC-95-1035-PCO-EI, issued August 21, 1995, in Docket No. 950359-EI. That Order granted Florida Steel Corporation's Motion to Intervene. Florida Steel has since changed its name to AmeriSteel Corporation. FPL then, on May 6, 1997, filed a Notice of Objection to AmeriSteel's request, saying that AmeriSteel's "...purpose is not to have the requested judicial notice taken.

Instead this is used as a pretext to argue that Order No. PSC-95-1035-PCO-EI is dispositive of AmeriSteel's current petition to intervene and to do so out of time."

In its Motion to Intervene, AmeriSteel states:

As a result of the return on equity cap established for FPL by the Commission, FPL customers have a profit sharing relationship with FPL. The charges collected by FPL from its customers can be reduced through Commission ordered refunds if FPL's profits exceed the range the Commission has specified.... AmeriSteel has a significant interest in ensuring that FPL does not take unnecessary or unwarranted charges that would prevent FPL from reaching the earnings sharings threshold and providing refunds to existing customers.... the "Added Expense Plan" described in this docket creates a huge amount of additional charges to offset revenue and earnings growth in the years 1998 and 1999. But for those charges, customers, including AmeriSteel, should expect refunds as FPL exceeds the profit sharing threshold.

In its response to the Motion to Intervene, FPL alleges that AmeriSteel has failed to meet both parts of the two-prong test set forth in Agrico Chemical vs. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So.2d 1359, 1361 (Fla. 1982).

In essence, FPL argues that this is not a proceeding to change rates and charges for FPL, and even if it were, the action taken can only have "a speculative and indirect impact" on AmeriSteel. Thus, FPL argues AmeriSteel has failed to demonstrate that it has or will suffer an injury of sufficient immediacy to satisfy the first prong of the Agrico test. Secondly, FPL argues that this proceeding is not for the purpose of protecting AmeriSteel's "competitive interests" or for the purpose of applying a fictional "return on equity cap". Therefore, FPL suggest that AmeriSteel has failed to satisfy the second prong of the Agrico test.

The Commission's action, protested by AmeriSteel, would authorize additional expenses supported by the rates AmeriSteel pays for electricity. AmeriSteel has alleged that, but for this plan, FPL would exceed its authorized range of return on equity. While "vested interest" is a term of art not usually applied to describe a ratepayers interest in any amount in excess of a utility's authorized range of return on equity, the determination of the appropriateness of the additional expenses is the core issue in this docket. We note there is no "earnings sharings plan" or

"return on equity cap" established for FPL. If it appears that FPL will earn in excess of its authorized range, affirmative action by the Commission may be required to capture jurisdiction over the excess earnings.

Sufficiency of AmeriSteel's Protest

Beginning on page 5 of its Protest, AmeriSteel describes in detail for approximately seven pages, why it believes the Commission should not approve the extension and modification of the plan. Among other things:

"The charges taken thus far have contributed to FPL's substantial growth in cash flow.... This tremendous increase in cash flow has allowed the company to increase its equity ratio and reduce its debt significantly. The corresponding improvement in FPL's financial profile has greatly benefited stockholders at the expense of refunds for customers." (Protest, para 8, pp.5-6)

"The extension of the Accelerated Depreciation Plan raises substantial factual and policy issues that should be addressed in a formal proceeding. These issues include unreasonable rates, excessive compensation and intergenerational equity." (Protest, para. 12, p.7)

"The instant proposal to modify and extend the Accelerated Depreciation Plan through the years 1998 and 1999 similarly affects AmeriSteel's substantial interests, as the amounts to be set aside for additional depreciation are likely to be substantially greater than the levels proposed by FPL in its 1995 petition." (Protest, para. 14, p. 7)

AmeriSteel suggests that extension of the "Added Expense Plan" is not in the public interest because:

- 1) the PAA's announced intent to "bring FPL's accounting in line with non-regulated companies" and to establish a "level accounting playing field between FPL and possible non-regulated competitors" are significant policy decisions which require a formal evidentiary hearing. (Protest, para. 16, p. 8)
- 2) the proposal utilizes stale, understated, revenue forecasts. (Protest, para. 17, p.9)
- 3) the scope of the added expense plan is excessive. (Protest, para. 18, pp.9-10)

- 4) Additional charges to other accounts approved by the plan have not been justified. (Protest, para. 19, p. 10)
- 5) The effect of the proposed plan extension on FPL customers must be addressed (Protest, para. 20, p. 11)
- 6) There is no demonstrated need to extend "The Added Expense Plan" (Protest paras. 21-23, pp. 11-12)

AmeriSteel concludes by saying "The proposed plan significantly enhances FPL's cash flow to the benefit of the Company's investors, but offers no benefits to consumers. In fact, the Plan may reduce FPL's reported earnings in such large amounts that it would deny customers benefits of potential refunds." (Protest, p. 12)

On June 10, 1997, FPL filed its Motion to Deny and Dismiss AmeriSteel's protest. FPL renewed its arguments on AmeriSteel's failure to state a substantial interest in this docket. FPL further alleges that the protest should be dismissed because AmeriSteel has not identified any disputed issues of material fact and "seeks to expand the of the proceeding beyond that permitted by Section 120.80(13)(b), Florida Statutes."

In light of this statute, FPL states that there are five conclusions that may be drawn concerning the procedure to be followed with respect to AmeriSteel's protest:

- 1) A protest of a "proposed agency action" by the Commission does not commence a de novo proceeding.
- 2) The Commission is to decide whether the protestant adequately stated a substantial interest in the Commission's action.
- 3) If a protest is granted, the Commission is to decide whether a Section 120.57(1) or a Section 120.57(2) hearing is required.
- 4) The scope of any hearing held, if a protest is granted, is restricted to issues, in the proposed action, that are placed in dispute by the Protest.
- 5) Issues in the proposed action that are not disputed by the Protest are deemed stipulated.

FPL then suggests, over nearly five pages, that "AmeriSteel's Protest is based on mischaracterization and sparring with

fictitious consequences constructed from such mischaracterization."
(Motion p.5)

On June 23, 1997, AmeriSteel filed its response to FPL's Motion to Deny and Dismiss. It states: "AmeriSteel's Protest objects to the plan in its entirety and requests that hearings be held to address approving the Proposed Plan as a whole is in the public interest." It then cites what it believes are nine separate disputed factual matters raised in its May 20, 1997 protest. AmeriSteel reiterates its allegations that it has sufficiently alleged a substantial interest in the proceeding.

The Commission's PAA Order takes one and only one substantive action. It modifies and extends the previously approved plan to two future periods.

Section 120.80(13)(b), Florida Statutes, provides:

Notwithstanding Sections 120.569 and 120.57, a hearing on an objection to proposed agency action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

This provision does not require, as FPL seems to advocate, that a person whose substantial interests are affected by proposed action to respond in detail, listing every potentially disputed fact which might be pertinent to every issue which might be related to the protest.

Since the PAA contained only one substantive action (approving an extension and modification of the plan) and that action has been protested, this is a de novo proceeding. Stated differently, there are no actions taken in the PAA which are not in dispute. Therefore, there are no issues subject to the application of Section 120.80(13)(b), Florida Statutes. Therefore, Section 120.80(13)(b), Florida Statutes, is not operative with respect to AmeriSteel's protest.

Section 366.04(1), Florida Statutes, grants the Commission jurisdiction to "regulate and supervise each public utility with respect to its rates and service". Part of the regulation and supervision of a public utility's rates includes the determination of the appropriate level of expense to be included by a public utility in its rates, and, to the extent that the rates are excessive (as compared to the utility's authorized return), the determination of what action (refund, rate reduction, change to

authorized return on equity, booking additional expenses, etc.) is appropriate.

We believe that AmeriSteel has demonstrated it has a substantial interest in this proceeding. Our finding that AmeriSteel has standing is based on two factors. First, regulatory approval is required. In the instant case, FPL is maintaining its books and records in accord with Generally Accepted Accounting Principles (GAAP), the Uniform System of Accounts (USoA), Commission Rules, and past orders of the Commission. The plan would alter the manner in which FPL maintains its books and records. Second, the amount at issue in this proceeding (potentially in excess of 200 million dollars per year) is, by any standard, material.

AmeriSteel's protest adequately identifies those factual matters that are in dispute. Further, since AmeriSteel has protested the extension and modification of the plan, and since the plan was the only action proposed in Order No. PSC-97-0499-FOF-EI, Section 120.80(13)(b), Florida Statutes, is not operative in this situation. Therefore, we find that FPL's Motion to Deny and Dismiss the Protest of AmeriSteel Corporation should be, and is hereby, denied.

AmeriSteel Corporation's Petition for Leave to Intervene

AmeriSteel's right to intervene in this proceeding is addressed by our decision on Florida Power & Light Company's Motion to Deny and Dismiss the Petition and Protest of AmeriSteel Corporation. Therefore, this issue is moot.

Appropriate Scope of this Docket

The scope of this docket shall be limited to the consideration of whether to approve the proposal to extend and modify the 1996/1997 "plan", approved in Order No. PSC-96-0461-FOF-EI, for the years 1998 and 1999. This includes the examination of the appropriateness of the elements, and their related amortization periods, included in the proposal for 1998 and 1999 that was the subject of Order No. PSC-97-0499-FOF-EI. The purpose of the plan was to mitigate the future impact of past deficiencies related to Commission prescribed depreciation, dismantlement and decommissioning accruals.

The plan contains historical expense elements that are "normally" recovered over an extended period of time in a regulated environment. Known historical amounts are related to the book-tax timing differences and the unamortized loss on reacquired debt.

Historical amounts that need to be determined include depreciation reserve deficiencies, fossil dismantlement reserve deficiencies and nuclear decommissioning reserve deficiencies. The determination of these amounts will be the subject of Commission review when the required studies are filed by FPL. The primary issue appears to be the time period over which these items should be amortized to expense. The plan has the effect of recovering of these items over a shorter time period.

Therefore, we find that the scope of this docket shall be limited to the consideration of extending the plan for 1998 and 1999 and to the examination of the elements of the plan. Although the scope of the docket in this proceeding has been addressed, it is premature to attempt to identify any particular issues at this time.

Since it is not required to resolve the issues currently before us, we decline to address the questions of the burden of proof in this proceeding and general policy with respect to ratepayer standing at this time.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that AmeriSteel's Motion to For Leave to File an Amended and Supplemental Petition and Protest to Proposed Agency Action, AmeriSteel's Request for Oral Argument, and AmeriSteel's Request for Continuance shall not be addressed at this time. It is further

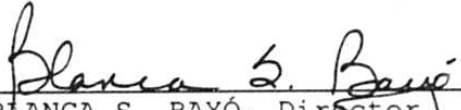
ORDERED FPL's Motion to Deny and Dismiss the Protest of AmeriSteel Corporation is denied. It is further

ORDERED that the scope of this docket shall be limited to the consideration of extending the plan for 1998 and 1999 and to the examination of the elements of the plan. It is further

ORDERED that this docket shall remain open pending resolution of AmeriSteel's protest of the Proposed Agency Action.

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By ORDER of the Florida Public Service Commission this 10th
day of September, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric,

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gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.